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Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

LILLIE M. MIDDLEBROOKS,
Petitioner,

v.

MICHAEL O. LEAVITT
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

LILLIE M. MIDDLEBROOKS, *Pro Se*
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QUESTIONS PRESENTED

1. Whether the Petitioner and Amicus produced sufficient evidence and produced established case laws to the U.S. Court of Appeals for the Fourth Circuit to establish the Petitioner's unequivocal right to pursue a Title VII civil action lawsuit against the National Institutes of Health.

2. Whether the Petitioner and Amicus produced sufficient evidence and produced established case laws to the U.S. Court of Appeals for the Fourth Circuit to establish the Petitioner's unequivocal right to amend her civil action complaint to come within the meaning of Title VII of the Civil Rights Act of 1964.

3. Whether there are any provisions within constitutional law which exclusively precludes a pro se litigant from amending a civil action complaint to come within the meaning of Title VII of the Civil Rights Act of 1964.

PARTIES TO THE PROCEEDINGS

Petitioner, Lillie M. Middlebrooks is an African-American. Ms. Middlebrooks served as the plaintiff during the district court's proceedings and served as the appellant during the Court of Appeals' proceedings.

Respondent, Michael O. Leavitt is Secretary of the Department and Health Human Services. Tommy G. Thompson, former Secretary of the Department of Health and Human Services served as the defendant during the district court's proceedings. Michael O. Leavitt, Secretary of the Department and Health and Human Services served as the appellee during the Court of Appeals' proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lillie M. Middlebrooks appearing *pro se* respectfully petitions the Court for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Fourth Circuit, in the case of Lillie M. Middlebrooks v. Michael O. Leavitt, which is appeal case no. 05-1860.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 525 F.3d 341 and is reprinted at 1a-19a of the appendix to this petition. The District Court's opinion is reprinted at 20a- 26a of the appendix to this appendix.

JURISDICTION

On May 6, 2008, the U.S. Court of Appeals for the Fourth Circuit issued a final decision with regard to Ms. Middlebrooks' pro se appeal. On July 21, 2008, the Petitioner requested a 60-day extension to file a petition for writ of certiorari. On July 23, 2008, Chief Justice John G. Roberts, Jr. extended the time to file a petition for writ of certiorari to October 3, 2008. Jurisdiction is conferred upon the United States Supreme Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOVLED

The Fourteenth Amendment to the U.S. Constitution provides that no state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States. The Fourteenth Amendment also provides that no state shall deny any person within its jurisdiction the equal protection of the laws.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 states:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under

this subchapter.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 states:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5 *[United States Code]*, in executive agencies *[other than the General Accounting Office]* as defined in section 105 of title 5 *[United States Code]* including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This case derives out of unlawful employment practices instituted by the National Institutes of Health of Bethesda, Maryland. During the year of 2003, the Petitioner hereinafter ("Ms. Middlebrooks") an African-American Registered Nurse applied for three federal excepted service nursing positions at the Warren Grant Magnuson

Clinical Center of the National Institutes of Health. The nursing vacancies at issue could either be filled by federal civilian personnel of the federal government or be filled by commissioned officer personnel of the U.S. Public Health Service Commissioned Corps. When Ms. Middlebrooks submitted her application to the National Institutes of Health, Ms. Middlebrooks requested that her application be considered for a federal civilian excepted service position and also requested that her application be considered for a commissioned officer position for the U.S. Public Health Service Commissioned Corps.

The U.S. Public Health Service Commissioned Corps, one of the U.S. Armed Forces is the uniformed service for the Department of Health and Human Services. The Public Health Service Commissioned Corps is an all officer corps and the commissioned officers of the Public Health Service Commissioned Corps routinely work in one of the operating division of the Department and Health and Human Services. The National Institutes of Health is an operating division of the Department of Health and Human Services.

In order to receive a commission in the U.S. Public Health Service Commissioned Corps, applicants must submit an application to the U.S. Public Health Service Division of Commissioned Personnel. Applicants must also submit an application for the actual job to one of the operating division of the Department of Health and Human Services.

The U.S. Public Health Service Commissioned Corps' employment vacancies are derived from federal civilian vacancies within the U.S. Federal

Government. Applicants must apply for federal civil service vacancies and must apply for federal excepted service vacancies. The application for the commission is processed by the U.S. Public Health Service Division of Commissioned Personnel. The application for the job is processed by the prospective federal agency. The application for the commission in the U.S. Public Health Service Commissioned Corps and the application for the actual job in the U.S. Public Health Service Commissioned Corps are independent of one another.

In other words, an applicant's qualifications to receive a commission in the U.S. Public Health Service Commissioned Corps do not automatically guarantee the applicant for a job as a commissioned officer in the U.S. Public Health Service Commissioned Corps. Vice versa, an individual's qualifications for the actual federal job vacancy do not automatically guarantee that the person will receive a position as a commissioned officer in the U.S. Public Health Service Commissioned Corps. Equally important, an individual may meet the qualification to fill the vacancy as a federal civilian employee. However, the individual may not meet the qualification to receive a commission in the U.S. Public Health Service Commissioned Corps. Unlike the U.S. Air Force, unlike the U.S. Navy, and unlike the U.S. Army, the U.S. Public Health Service Commissioned Corps do not guarantee an applicant for job as a commissioned officer once the applicant has been deemed determined qualified for a commission.

The U.S. Public Health Service Commissioned Corps do not have any jurisdiction over the actual job.

Additionally, whether an individual is qualified for a commission, the U.S. Public Health Service Commissioned Corps do not have the authority to order a federal agency to hire an individual as a commissioned officer for the U.S. Public Health Service Commissioned Corps. Unlike the other U.S. Armed Forces, the U.S. Public Health Service Commissioned Corps do not have vacancies exclusively opened only to commissioned officers and exclusively opened to applicants to the U.S. Public Health Service Commissioned Corps. The U.S. Public Health Service Commissioned Corps' employment vacancies are federal civilian vacancies of the U.S. Government. Moreover, the U.S. Public Health Service Commissioned Corps' employment vacancies are opened to federal civilian employees, civilians, and opened commissioned corps officers of U.S. Public Health Service Commissioned Corps.

In this case, on February 10, 2003, Ms. Middlebrooks applied for two vacant nursing positions advertised at the Warren Grant Magnuson Clinical Center of the National Institutes of Health. Ms. Middlebrooks submitted an application for vacancy announcement CC-02-2581 advertised as a Clinical Research Nurse in Pediatrics. Ms. Middlebrooks also submitted an application for vacancy announcement CC-02-2557 advertised as a Clinical Research Nurse in the Medical Surgical Internship.

On March 7, 2003, Ms. Middlebrooks phoned a designated nurse recruiter by the name of Rosalie Smith hereinafter ("Ms. Smith") to check on the status of her application. During the phone conversation, Ms. Middlebrooks made an inquiry with regard to her application for a pediatric nurse.

Ms. Smith subsequently informed Ms. Middlebrooks that the nurse managers were not interviewing for positions as a pediatric nurse. Ms. Middlebrooks then made an inquiry with regard to her application for the Medical Surgical Internship. Ms. Smith informed Ms. Middlebrooks that she was over qualified for a position as Clinical Research Nurse for the Medical-Surgical Internship. Ms. Smith communicated to Ms. Middlebrooks that the nurse managers would not select Ms. Middlebrooks for an interview for the Medical Surgical Internship because of Ms. Middlebrooks' experience. Ms. Smith asserted that the Medical Surgical Internship was strictly for inexperience nurses. Needless to say, the Medical Surgical Internship's vacancy announcement did not succinctly articulate that the Medical Surgical Internship was strictly for inexperience nurses.

After Ms. Smith disseminated the information about the Medical Surgical Internship, Ms. Middlebrooks subsequently received a letter from Dr. Clare Hastings hereinafter ("Dr. Hastings"), the Chief of Nursing Patient Services for the Warren Grant Magnuson Clinical Center of the National Institutes of Health. On March 26, 2003, Dr. Hastings notified Ms. Middlebrooks that the Medical Surgical Internship Program would not be offered for the year of 2003. Ironically, the National Institutes of Health continued to advertise the Medical Surgical Internship on the Warren Grant Magnuson Clinical Center's web site, even after Dr. Hastings disseminated the letter to Ms. Middlebrooks.

Ms. Middlebrooks subsequently submitted an application for vacancy announcement CC-03-2621

advertised as an Operating Room Nurse at the National Institutes of Health Warren Grant Clinical Center. On May 2, 2003, Ms. Middlebrooks contacted a designated EEO counselor at the Warren Grant Magnuson Clinical Center. Ms. Middlebrooks notified the EEO counselor of the conversation with Ms. Smith and notified the EEO counselor of the letter written by Dr. Hastings. The EEO counselor informed Ms. Middlebrooks that the National Institutes of Health was undergoing a hiring freeze. However, Ms. Middlebrooks presented evidence that the National Institutes of Health hired two registered nurses as commissioned officers during the month of March of 2003, which is the same month that Ms. Smith and Dr. Hastings disseminated the information to Ms. Middlebrooks.

After contacting the designated EEO counselor, on May 3, 2003, Ms. Middlebrooks received a notification indicating that the National Institutes of Health's Human Resources Department was processing Ms. Middlebrooks' application for the Medical Surgical Internship. As discussed earlier, Dr. Hastings had previously notified Ms. Middlebrooks that the Medical Surgical Internship would not be offered for the year of 2003. However, approximately two months after Dr. Hastings' letter, Ms. Middlebrooks received notification that her application was being processed for a position in the Medical Surgical Internship. After receiving the Human Resources' notification, Ms. Middlebrooks elected to participate in informal EEO counseling with regards to Ms. Middlebrooks' denial of employment opportunity at the Warren Grant Magnuson Clinical Center of the National Institutes of Health.

During the informal EEO counseling stage, Ms. Middlebrooks challenged both her non-selection for a federal civilian nursing position and challenged her non-selection for a commissioned officer position. The EEO counselor obtained statements from Ms. Smith and Dr. Hastings. Ms. Smith and Dr. Hastings both asserted that no selections were made with regard to vacancy announcement CC-02-2581 advertised as a Clinical Research Nurse in Pediatrics. Ms. Smith and Dr. Hastings also asserted that no selections were made for vacancy announcement CC-02-2557 advertised as a Clinical Research Nurse for the Medical Surgical Internship. Ms. Smith and Dr. Hastings alleged that no selections were made due to the National Institutes Health's alleged hiring freeze. Therefore, the EEO counselor concluded that no discriminatory treatment occurred. After the informal EEO findings, Ms. Middlebrooks filed a formal discrimination complaint with the National Institutes of Health Office of Equal Opportunity and Diversity Management.

In the informal EEO complaint and the formal EEO complaint Ms. Middlebrooks alleged discrimination in hiring when she was not selected for positions as a pediatric nurse, medical surgical nurse and operating room nurse advertised as vacancies CC-02-2581, CC-02-2557, and CC-03-2621. Ms. Middlebrooks also alleged discrimination in hiring for the non-selection for a commissioned officer position. Subsequently, the National Institutes of Health accepted Ms. Middlebrooks' allegations of discrimination in hiring for her non-selections for three federal civilian nursing vacancies advertised

as CC-02-2581, CC-02-2557, CC-03-2621.

A consulting firm by the name of Delany, Siegel, and Zorn was designated to complete the investigation of the formal complaint of discrimination filed by Ms. Middlebrooks. On December 4, 2003, the National Institutes of Health issued a Report of Investigation. The Report of investigation reveals that Ms. Middlebrooks was a victim of discrimination and retaliation in hiring from the National Institutes of Health. The lead investigator obtained testimonies from Ms. Lillie Middlebrooks an African-American female, Ms. Rosalie Smith a Caucasian American female, Dr. Clare Hastings a Caucasian American female, Barbara Corey a Caucasian American female, Ms. Sharon Quinn, a non-minority female, Mr. Steve Balog a Caucasian American male and Susan Rynders a Caucasian American female.

With regard to vacancy announcement CC-02-2581 advertised as a Clinical Research Nurse in Pediatrics, the Report of Investigation reveals that Ms. Smith, a designated nurse recruiter processed the applications for vacancy announcement CC-02-2581. The Report of Investigation confirms that an Asian/Pacific Islander female was selected to fill the position as a pediatric nurse advertised as vacancy announcement CC-02-2581. Evidence of record reveals that Ms. Smith expeditiously referred the Asian/Pacific Islander's application to the selecting official. However, the Report of Investigation confirms that Ms. Smith never referred Ms. Middlebrooks' application to the selecting official. As a matter of fact, the selecting official Barbara Corey hereinafter("Ms. Corey") testified that she was not aware of Ms. Middlebrooks' application until she was

contacted by the EEO investigator. The Report of Investigation reveals that Ms. Smith expeditiously arranged an interview for the Asian/Pacific Islander. However, evidence of record confirms that Ms. Smith never arranged an interview for Ms. Middlebrooks. Evidence of record confirms that Ms. Smith never placed Ms. Middlebrooks' name on the initial list of applicants for vacancy announcement CC-02-2581. Documentary evidence also confirms that the Asian/Pacific Islander had less years of professional nursing experience than of Ms. Middlebrooks.

Evidence of record reveals that Dr. Hastings testified under oath that she did not have any involvement with regard to vacancy announcement CC-02-2581 advertised as a Clinical Research Nurse in Pediatrics. However, the selecting official Ms. Corey testified that she had to receive permission from Dr. Hasting to hire for vacancy announcement CC-02-2581. Evidence further reveals that Dr. Hasting approved the individual salary assignment when the National Institutes of Health hired the Asian/Pacific Islander to fill vacancy announcement CC-02-2581.

In retrospect, Ms. Middlebrooks' application was never rated, never referred, and never processed for vacancy announcement CC-02-2581. Equally disturbing, the National Institutes Health retaliated against Ms. Middlebrooks by officially cancelling vacancy announcement CC-02-2581 after Ms. Middlebrooks filed an EEO complaint alleging discrimination with regard vacancy announcement CC-02-2581.

With regard to vacancy announcement CC-02-2557, advertised as a Clinical Research Nurse in the Medical Surgical Internship, the Report of Investigation reveals that no selections were made for the Medical Surgical Internship. Although no selections were made for the Medical Surgical Internship, discriminatory animus and retaliatory inferences arises when the National Institutes of Health did not hire Ms. Middlebrooks for the Medical Surgical Internship. Evidence of record reveals that Ms. Smith, a designated nurse recruiter processed the applications for the Medical Surgical Internship. The Report of Investigation reveals that Ms. Smith did not rate Ms. Middlebrooks' application for the Medical Surgical Internship, did not refer Ms. Middlebrooks' application for the Medical Surgical Internship, and did not process Ms. Middlebrooks' application for the Medical Surgical Internship. The Report of Investigation reveals that Ms. Smith referred eleven applicants to the selecting official for the Medical Surgical Internship. However, Ms. Smith did not refer Ms. Middlebrooks' name to the selecting official. The investigative file also reveals that the National Institutes of Health continued to accept and continued to refer applications for the Medical Surgical Internship, even after Dr. Hastings notified Ms. Middlebooks that the Medical Surgical Internship would not be offered for the year of 2003. Accordingly, an inference can be drawn to conclude that the National Institutes of Health was in the process of selecting applicants for the Medical Surgical Internship. However, the National Institutes of Health elected not to make any selections, since Ms. Middlebrooks filed a formal discrimination complaint and had an ongoing EEO investigation with regard to her

application for the Medical Surgical Internship.

With regard to vacancy announcement CC-03-2621 advertised as an Operating Room Nurse, the investigative file reveals that the National Institutes of Health selected a less qualified and less educated Asian Registered Nurse for the position as an Operating Room Nurse. The Report of Investigation also demonstrates that the National Institutes of Health wrote the word black next to Ms. Middlebrooks' name on the list of applicants referred to the selecting official for the position as an Operating Room Nurse.

The Report of Investigation further substantiates that the National Institutes of Health retaliated against Ms. Middlebrooks when the National Institutes of Health did not select Ms. Middlebrooks to fill the position as an Operating Room Nurse advertised as vacancy announcement CC-03-2621. On July 15, 2003, Ms. Middlebrooks filed a formal employment discrimination complaint against the National Institutes of Health. As illustrated by the Report of Investigation, on August 20, 2003, Ms. Middlebrooks testified in an official EEO investigation regarding employment discrimination committed by the National Institutes of Health. Seven days after testifying in an EEO investigation, the National Institutes of Health selected a less qualified Asian female to fill the position as an Operating Room Nurse advertised as vacancy announcement CC-03-2621. Equally disturbing, the National Institutes of Health did not select Ms. Middlebrooks to interview for the position as an Operating Room Nurse. Therefore, the non-selection of Ms. Middlebrooks for the position as an Operating

Room Nurse occurred within a time that retaliatory inference arises.

Testimony from the selecting officials for vacancy announcement CC-03-2621 substantiates pretext. In particular, Mr. Steve Balog, hereinafter("Mr. Balog") a selecting official for vacancy announcement CC-03-2621, testified that the Asian Registered Nurse was more qualified than Ms. Middlebrooks. However, evidence of record reveals that Ms. Middlebrooks has a higher educational level than of the Asian Registered Nurse. Ms. Middlebrooks has a Bachelor of Science Degree in Nursing. Ms. Middlebrooks is also a graduate from an accredited nursing program. The investigative file reveals that the Asian Registered Nurse has a diploma in the field of nursing. Therefore, evidence of record reveals that the Asian nurse did not obtain a professional degree in the field of nursing. Additionally, evidence of record is inconclusive to validate that the Asian nurse is a graduate from an accredited nursing program. The position requires that the selectee to be a graduate from an accredited nursing program.

In addressing why Ms. Middlebrooks was not selected for the position, Mr. Balog stated, "We would have to teach her how to be an OR nurse, we do not have that capability here." Mr. Balog also stated, "We wanted someone who could come in here and within ninety days be able to function fully and independently." Mr. Balog stated, "We did not want to have to teach someone." Mr. Balog stated, "Ms. Middlebrooks have never taken care of patient who had any of these larger or more complex procedures." Susan M. Rynders, a selecting official for vacancy CC-03-2621 stated, "Lillie Middlebrooks has no

experience in a large OR ."

It is rather appalling that a major federal research facility lacks the capability to train prospective employees. Additionally, because of Ms. Middlebrooks' race and Ms. Middlebrooks' EEO activity, the National Institutes of Health did not interview Ms. Middlebrooks for the position as an Operating Room Nurse. If an interview was granted, Ms. Middlebrooks could have elaborated on her experience with regard to the position as an Operating Room Nurse.

After receiving the Report of Investigation, Ms. Middlebrooks requested for the National Institutes of Health to issue a final agency decision. The National Institutes of Health issued a final agency decision articulating no discrimination. Accordingly, Ms. Middlebrooks timely filed a pro se Title VII civil action complaint in the U.S. District Court for the District of Maryland. The district court dismissed Ms. Middlebrooks' pro se complaint with prejudice pursuant Fed. R. Civ. P. 12(b)(1).

PROCEDURAL HISTORY

A. District Court

On August 27, 2004, Ms. Middlebrooks commenced a pro se civil action complaint pursuant Title VII of the Civil Rights Act of 1964 in the United States District Court for the District of Maryland. In the civil action complaint, Ms. Middlebrooks alleged employment discrimination on the basis of race and alleged retaliation on the basis of protected EEO activity when Ms. Middlebrooks was not selected for

three federal civilian nursing vacancies at the National Institutes of Health Warren Grant Magnuson Clinical Center. Ms. Middlebrooks also challenged the non-selection of a commissioned officer position.

On November 17, 2004, the Government filed an extension to file a response to Ms. Middlebrooks' civil action complaint. The district court subsequently granted the Government an extension to file an answer to Ms. Middlebrooks' civil action complaint. Rather than filing an answer to Ms. Middlebrooks' civil action complaint, the Government filed a motion to dismiss Ms. Middlebrooks' civil action complaint in its entirety pursuant to Fed. R. Civ. P. 12 (b)(1) on the grounds of lack of subject matter jurisdiction. Ms. Middlebrooks subsequently filed an opposition to the Government's motion to dismiss.

Rather than instructing Ms. Middlebrooks on how to cure the defects of her pro se complaint, on June 13, 2005, the district court completely disposed all of Ms. Middlebrooks Title VII claims with prejudice due to lack of subject matter jurisdiction. The district court did not hold a motion's hearing prior to disposing all of Ms. Middlebrooks' Title VII claims with prejudice. It is well established that Article III of the U.S. Constitution deprives federal courts the power to dismiss a case with prejudice where federal subject matter jurisdiction does not exist.

In its' ruling, the district court conclude that Ms. Middlebrooks was subjected to the military exception rule. Therefore, the district court ruled that Ms. Middlebrooks could not pursue a Title VII claim against the National Institutes of Health. However,

Ms. Middlebrooks clearly illustrated in her opposition that she was not subjected to the military exception rule. Moreover, Ms. Middlebrooks presented that under the Feres Doctrine concept the alleged discriminatory activity and the challenged personnel acts as described in Ms. Middlebrooks' complaint did not occur out of incident to any military service. Therefore, Ms. Middlebrooks established her standing to pursue a Title VII claim based on the non selections for three Title 42 federal civilian excepted service positions.

B. Appeals Court

On June 13, 2005, the district court entered a final judgment of dismissing Ms. Middlebrooks' Title VII civil action complaint in its entirety with prejudice pursuant to Fed. R. Civ. P. 12(b)(1). On August 3, 2005, Ms. Middlebrooks timely filed a notice of appeal. Shortly thereafter, the U.S. Court of Appeals for the Fourth Circuit issued an order notifying the parties that the appeal would be conducted under the informal briefing schedule. Pursuant to 28 U.S.C. § 1291 and on September 26, 2005, Ms. Middlebrooks filed a pro se appeal in the U.S. Court of Appeals for the Fourth Circuit.

In the her pro se brief, Ms. Middlebrooks requested relief for thirty-two issues presented to the U.S. Court of Appeals for the Fourth Circuit. Ms. Middlebrooks' pro se appeal primarily focused on Ms. Middlebrooks' right to amend her pro se complaint to come within the meaning of Title VII of the Civil Rights Act of 1964. Equally important, Ms. Middlebrooks succinctly demonstrated that she had a right to be afforded the opportunity to establish

subject matter jurisdiction upon the district court. Moreover, Ms. Middlebrooks clearly illustrated that she was not subjected to the military exception rule. Additionally, Ms. Middlebrooks also presented published case laws which illustrated that Ms. Middlebrooks has a standing to pursue a Title VII claim against the National Institutes of Health.

After Ms. Middlebrooks filed her pro se brief, the U.S. Court of Appeals for the Fourth Circuit issued a letter articulating that Ms. Middlebrooks' pro se brief needed to be prepared by an attorney. The Court of Appeals also suggested that Ms. Middlebrooks submit an application to proceed in forma pauperis so that the Court of Appeals could determine if Ms. Middlebrooks qualified for a court appointed counsel. Ms. Middlebrooks elected not to proceed in forma pauperis.

On June 19, 2006, the Court of Appeals issued an order directing the Government to file a responsive brief to Ms. Middlebrooks' pro se brief. Therefore, on June 29, 2006, the Government filed a responsive brief. Shortly thereafter, Ms. Middlebrooks filed a reply brief to the Government's responsive brief. Ms. Middlebrooks' reply brief presented reliable evidence that Ms. Middlebrooks established subject matter jurisdiction upon the district court. On October 26, 2006, the Court of Appeals sua sponte appointed Mr. Steven H. Goldblatt and the Georgetown University Law Center as counsel to represent Ms. Middlebrooks on her appeal. The Court of Appeals also instructed Georgetown University Law Center Appellate Litigation Clinic to rewrite a formal brief on Ms. Middlebrooks' behalf. Interestingly, the Court of Appeals articulated to Georgetown University

Law Center what issue to present in the formal brief.

On January 4, 2007, Ms. Middlebrooks filed a motion to remain as a pro se litigant. Ms. Middlebrooks subsequently requested for the Court of Appeals to adjudicate the issues that Ms. Middlebrooks presented in her pro se brief. On January 31, 2007, the Court of Appeals granted Ms. Middlebrooks' request to remain as a pro se litigant. The Court of Appeals then appointed Georgetown University Law Center Appellate Litigation Clinic as Amicus in support of Ms. Middlebrooks. On February 1, 2007, the Court of Appeals issued a briefing order with regard to Georgetown University Law Center's Amicus brief.

On February 14, 2007, Georgetown University Law Center Appellate Litigation Clinic submitted an Amicus brief along with a supplemental appendix in support of Ms. Middlebrooks. On March 12, 2007, the Government submitted a responsive brief on behalf of the Government's contentions. On April 12, 2007, Amicus filed a reply brief in response to the Government's brief. Shortly thereafter, on April 20, 2007 the Court of Appeals issued an order articulating that the case would be scheduled for oral argument. On October 15, 2007, the Court of Appeals scheduled the case for oral argument on December 4, 2007.

On December 4, 2007, oral argument was held before the U.S. Court of Appeals for the Fourth Circuit. David Joseph Arkush argued on behalf of the Amicus' support. Melanie L. Glickson argued on behalf to the Department of Health and Human

Services. At the oral argument, Ms. Melanie L. Glickson, the Government's counsel was not able to answer the questions posed by the U.S. Court of Appeals for the Fourth Circuit. Therefore, on December 4, 2007, the Court of Appeals issued an order directing the Government's counsel to submit post argument statements in order to answer the questions that the Government's counsel was unable to answer at the oral argument. Therefore, the Court of Appeals ultimately allowed the Government ten extra days to go back to the office and think about how to answer the questions that the Government was unable to answer at the oral argument.

Additionally, according to the Government's post argument filing, the Government received instructions from the Court of Appeals' clerk on how to present the Government's post argument filing. The Clerk's office advised the Government to write a letter, write a notice, or write a pleading to answer the questions that the Government's counsel was unable to answer at the oral argument. Needless to say, the Government's counsel did not serve a copy of the Government's post argument filing upon Ms. Middlebrooks. Therefore, the U.S. Court of Appeals for the Fourth Circuit issued a legal decision without all of the filings being served on all parties involved in the case.

On May 6, 2008, the U.S. Court of Appeals for the Fourth Circuit issued a published opinion with regard to Ms. Middlebrooks' pro se appeal. In the published opinion, the U.S. Court of Appeals for the Fourth Circuit asserted that a de novo analysis was completed in regards to Ms. Middlebrooks' pro se appeal. However, as the record illustrates, the Court

of Appeals did not issue findings on any of the thirty-two issues that Ms. Middlebrooks presented before the U.S. Court of Appeals for the Fourth Circuit. Equally disturbing, the U.S. Court of Appeals for the Fourth Circuit unethically rejected numerous legal arguments and legal contentions presented by Ms. Middlebrooks and presented by Amicus. The legal arguments and legal contentions established Ms. Middlebrooks' unequivocal right to amend her pro se complaint to come within in the meaning of Title VII. Ms. Middlebrooks and Amicus also demonstrated Ms. Middlebrooks' unequivocal standing to pursue a Title VII claim against the National Institutes of Health.

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari because the district court's adjudication of this case and the appellate court's adjudication of this case remarkable deviated from established constitutional judicial protocol.

After a detail review of the district court's proceedings and the appellate court's proceedings, an impartial fact finder will likely conclude that the district court and the appellate court failed to incorporate established constitutional judicial protocols for the administration of constitutional judicial justice. It is very apparent that the district court and the appellate court put forth great effort to deprive Ms. Middlebrooks of her constitutional right to pursue a Title VII claim against the National Institutes of Health.

As discussed earlier, Ms. Middlebrooks filed a pro se

Title VII complaint against the Department of Health and Human Services in the U.S. District Court for the District of Maryland. After filing her civil action lawsuit against the Government, the Department of Health and Human Services filed a motion to dismiss Ms. Middlebrooks' lawsuit. Accordingly, Ms. Middlebrooks filed an opposition to Government's motion to dismiss. Needless to say, the district court granted the Government's motion to dismiss. Additionally, the district court dismissed Ms. Middlebrooks' lawsuit with prejudice thus leaving absolutely no legal avenues for Ms. Middlebrooks to seek redress with regard to her employment discrimination claim against the National Institutes of Health.

Prior to the dismissal of Ms. Middlebrooks' lawsuit, the district court did not hold a motion's hearing. Equally disturbing, the district court opinion did conduct a de novo analysis of all contentions raised in Ms. Middlebrooks' opposition. Further, the district court did not adjudicate Ms. Middlebrooks' opposition to the Government's motion to dismiss. Lastly, the district court did not allow Ms. Middlebrooks to amend her pro se complaint and did not instruct Ms. Middlebrooks on how to cure the defects of her pro se complaint.

The district court undoubtedly deprived Ms. Middlebrooks of the litigation right to establish subject matter jurisdiction upon the district court. Moreover, the district court abused its discretion in dismissing Ms. Middlebrooks' pro se complaint with prejudice. It is rather a drastic measure to dismiss a complaint with prejudice not withstanding the fact that the district court did not have the constitutional

powers to dismiss Ms. Middlebrooks' complaint with prejudice. As discussed earlier, Article III of the U.S. Constitution deprives federal courts the power to dismiss a case with prejudice where federal subject matter jurisdiction does not exist. Additionally, it is rather an extreme measure to dismiss a pro se complaint with prejudice, without affording the pro se litigant the constitutional right to amend the complaint. Equally important, the district court did not even allow Ms. Middlebrooks to initiate discovery prior to dismissing Ms. Middlebrooks' complaint. However, the district court granted the Government's motion to dismiss without commencing discovery to substantiate the contentions raised in the Government's motion to dismiss.

After the district court ruled in favor of the Government, Ms. Middlebrooks filed a pro se appeal in the U.S. Court of Appeals for the Fourth Circuit. Ms. Middlebrooks' pro se appeal contested the constitutional deprivations instituted by the district court during the adjudication of Ms. Middlebrooks' lawsuit. As the appellate court record illustrates, the Court of Appeals elected not to address and elected not to acknowledge any of the issues presented in Ms. Middlebrooks' pro se brief. Ms. Middlebrooks has the legal inherent right to be afforded a de novo review and de novo analysis of all issues presented in Ms. Middlebrooks' pro se brief.

In Ms. Middlebrooks' pro se brief, Ms. Middlebrooks contested that the district court abused its discretion in dismissing her pro se complaint with prejudice. Ms. Middlebrooks contested that material evidence reflects that the district court judge and the

defendant's undersigned counsel engaged in off the record discussions to dismiss Ms. Middlebrooks' pro se complaint with prejudice. Ms. Middlebrooks contested that the district court abused its discretion in the adjudication of Ms. Middlebrooks' pro se complaint. Ms. Middlebrooks contested that the district court abused its discretion in failing to liberally construe Ms. Middlebrooks' pro se complaint. Ms. Middlebrooks contested that the district court should have granted Ms. Middlebrooks leave to file an amended complaint, rather than dismissing Ms. Middlebrooks' pro se complaint with prejudice. Ms. Middlebrooks contested that the district court erred in failing to implement the merits raised in Ms. Middlebrooks' opposition to the Government's motion to dismiss. Ms. Middlebrooks contested that she amended her complaint in Ms. Middlebrooks' opposition to the Government's motion to dismiss. Ms. Middlebrooks contested that the district court failed to follow established protocols for the adjudication of a 12(b)(1) motion to dismiss. Ms. Middlebrooks contested that Ms. Middlebrooks' material evidence met the burden of persuasion to establish subject matter jurisdiction. Ms. Middlebrooks contested that she met the statutory definition of a plaintiff who may pursue a federal sector Title VII civil action complaint. However, as illustrated by the appellate court opinion, the U.S. Court of Appeals for the Fourth Circuit did not acknowledge and did not adjudicate the above articulated issues which were presented in Ms. Middlebrooks' pro se brief.

The appellate court record also demonstrates that in Ms. Middlebrooks' pro se brief, Ms. Middlebrooks

asserted that she properly invoked subject matter jurisdiction by completing the jurisdictional prerequisites for the filing of a federal sector Title VII lawsuit. Ms. Middlebrooks contested that she invoked subject matter jurisdiction pursuant to count one of her pleaded complaint as a civilian applicant alleging employment discrimination when the National Institutes of Health did not hire Ms. Middlebrooks for a civilian nursing position as a Clinical Research Nurse in Pediatrics advertised as vacancy announcement CC-02-2581. Ms. Middlebrooks' contested that she invoked subject matter jurisdiction pursuant to count one of her pleaded complaint as a civilian applicant alleging employment discrimination when the National Institutes of Health did not hire Ms. Middlebrooks for a civilian nursing position as a Clinical Research Nurse for the Medical Surgical Internship advertised as vacancy announcement CC-02-2557. Ms. Middlebrooks contested that she invoked subject matter jurisdiction pursuant to count one of her pleaded complaint as a civilian applicant alleging employment discrimination when the National Institutes of Health did not hire Ms. Middlebrooks for a civilian nursing position as an Operating Room Nurse advertised as vacancy announcement CC-03-2621. Ms. Middlebrooks contested that she invoked subject matter jurisdiction pursuant to count two of her complaint as a civilian applicant alleging employment discrimination when the National Institutes of Health did not rate, did not refer, and did not consider Ms. Middlebrooks' application for a civilian position as a Clinical Research Nurse in Pediatrics advertised as vacancy announcement CC-02-2581. Ms. Middlebrooks' contested that she invoked subject matter jurisdiction pursuant to

count two of her complaint as a civilian applicant alleging employment discrimination when the National Institutes of Health did not rate, did not refer, and did not consider Ms. Middlebrooks' application for a civilian position as a Clinical Research Nurse for the Medical Surgical Internship advertised as vacancy announcement CC-02-2557. Ms. Middlebrooks contested that she invoked subject matter jurisdiction pursuant to count two of her complaint as a civilian applicant alleging employment discrimination when the National Institutes of Health did not rate, did not refer, and did not consider Ms. Middlebrooks' application for a civilian position as an Operating Room Nurse advertised as vacancy CC-03-2621. Ms. Middlebrooks contested that she invoked subject matter jurisdiction pursuant to count three of her complaint as a civilian applicant alleging unlawful retaliation when the National Institutes of Health did not hire Ms. Middlebrooks for a civilian nursing position as an Operating Room Nurse advertised as vacancy CC-03-2621. Ms. Middlebrooks contested that she invoked subject matter jurisdiction pursuant to count three of her complaint as a civilian applicant alleging unlawful retaliation when Ms. Middlebrooks suffered an adverse employment action of when the National Institutes of Health canceled the position as a Clinical Research Nurse in Pediatrics after Ms. Middlebrooks filed an EEO complaint in regards to not being hired to fill vacancy announcement CC-02-2581. Ms. Middlebrooks contested that she invoked subject matter jurisdiction when the Department of Health and Human Services waived sovereign immunity in the final agency decision. However, as illustrated by the appellate court opinion, the U.S. Court of

Appeals for the Fourth Circuit did not acknowledge and did not adjudicate the above articulated issues which were presented in Ms. Middlebrooks' pro se brief.

The appellate court record also confirms that in Ms. Middlebrooks' pro se brief, Ms. Middlebrooks contested that the Department of Health and Human Services waived sovereign immunity when the National Institutes of Health accepted and investigated Ms. Middlebrooks' allegations of discriminatory practices with regard to Ms. Middlebrooks' non-selection for three federal excepted service civilian positions. Ms. Middlebrooks contested that the district court erred in applying the military exception rule to a civilian applicant alleging employment discrimination of when she was not selected for three federal excepted service civilian positions. Ms. Middlebrooks contested that the district court opinion did not meet the standard for the dismissal of Ms. Middlebrooks' civil action complaint. Ms. Middlebrooks contested that the alleged discriminatory personnel act of not selecting Ms. Middlebrooks for a position as a Clinical Research Nurse in Pediatrics was not inherently related to a military's unique structure. Ms. Middlebrooks contested that the alleged discriminatory personnel act of not selecting Ms. Middlebrooks for a position as a Clinical Research Nurse for the Medical Surgical Internship was not inherently related to a military's unique structure. Ms. Middlebrooks contested that the alleged discriminatory personnel act of not selecting Ms. Middlebrooks for a position as an Operating Room Nurse was not inherently related to a military's unique structure. Ms. Middlebrooks contested that

the alleged discriminatory personnel act of not rating, not referring, and not considering Ms. Middlebrooks' application for vacancy announcement CC-02-2581 advertised as a Clinical Research Nurse in Pediatrics was not inherently related to a military's unique structure. Ms. Middlebrooks contested that the alleged discriminatory personnel act of not rating, not referring, and not considering Ms. Middlebrooks' application for vacancy announcement CC-02-2557 advertised as a Clinical Research Nurse for the Medical Surgical Internship was not inherently related to a military's unique structure. Ms. Middlebrooks contested that the alleged discriminatory personnel act of not rating, not referring, and not considering Ms. Middlebrooks' application for vacancy announcement CC-03-2621 advertised as an Operating Room Nurse was not inherently related to a military's unique structure. Ms. Middlebrooks contested that the alleged discriminatory personnel act of retaliating against Ms. Middlebrooks when the National Institutes of Health did not hire Ms. Middlebrooks for a position as an Operating Room Nurse was not inherently related to a military's unique structure. Ms. Middlebrooks contested that the alleged retaliatory personnel act of canceling the vacancy as a pediatric nurse advertised as vacancy announcement CC-02-2581 was not inherently related to a military's unique structure. Ms. Middlebrooks' contested that the district court erred in failing to enter a default judgment against the U.S. Government pursuant to Fed. R. Civ. P. 55. However, as illustrated by the appellate court opinion, the U.S. Court of Appeals for the Fourth Circuit did not acknowledge and did not adjudicate the above articulated issues which were presented in Ms. Middlebrooks' pro se brief.

Even though all of the issues presented in Ms. Middlebrooks' pro se brief were relevant to the district court proceedings, the Court of Appeals elected not to complete a de novo review of the issues presented in Ms. Middlebrooks' pro se brief. In essence, the Court of Appeals essentially dismissed the issues and rejected the contentions presented in Ms. Middlebrooks' pro se brief. Equally disturbing, the Court of Appeals failed to provide a lawful explanation for adamantly rejecting and adamantly refusing to adjudicate the legitimate legal issues presented in Ms. Middlebrooks' pro se brief. As a pro se litigant, Ms. Middlebrooks was entitled to have the issues adjudicated by the Court of Appeals. Moreover, the Court of Appeals had the constitutional duty and obligation to adjudicate the issues presented in Ms. Middlebrooks' pro se appeal.

Evidence of record further illustrates that the Court of Appeals exhibited preferential treatment to the Government by allowing the Government to file post arguments filings with regard to the questions that the Government's counsel was unable to answer during the oral argument hearing. The Court of Appeals also instructed the Government's counsel on what type of pleading to submit with regard to filing the court ordered post argument pleading. Needless to say, the Government's counsel never served the post argument filings on Ms. Middlebrooks. Equally disturbing, the Court of Appeals rejected Amicus' unopposed motion for leave to file a response to the Government's post argument filing.

As discussed in this petition, the district court implemented unethical judicial protocols for

dismissing Ms. Middlebrooks' pro se complaint with prejudice. Evidence of record further illustrates that the Court of Appeals implemented unethical judicial protocols in totally disregarding the issues and dismissing the issues presented in Ms. Middlebrooks' pro se brief. Therefore, certiorari should be granted on the basis that the district court and the appellate court departed remarkably from established judicial protocols for the adjudication of Ms. Middlebrooks' pro se civil action complaint and for the adjudication of Ms. Middlebrooks' pro se appeal. Therefore, Ms. Middlebrooks respectfully request for the U.S. Supreme Court to reinforce, to reemphasize, and to upgrade the established judicial protocols for extending constitutional rights to pro se litigants in United States Judicial System.

II. The Court should grant certiorari because the U.S. Court of Appeals for the Fourth Circuit issued a published case law that contains ambiguous language.

With regard to this case, the Court of Appeals issued a legal opinion vacating and remanding the district court decision with instructions. As the record illustrates, the Court of Appeals issued a published opinion that contains ambiguous instructions and ambiguous language. In the opinion, the Court of Appeals directed the district court to determine the characterization of Ms. Middlebrooks' application to the National Institutes of Health. In determining the characterization of Ms. Middlebrooks' application, the Court of Appeals set forth the following instructions:

> If the nursing positions to which

> Middlebrooks applied were designated for commissioned PHSCC officers, then Middlebrooks' application is best characterized as one to the PHSCC. Accordingly, she would lack a Title VII claim under 2000e-16(a) with regard to any hiring decision related to those positions. But if the NIH vacancies were not designated for commissioned officers and could be filled by civilians, and if the PHSCC retained discretion to reject applicants regardless of their approval by the NIH(that is if Middlebrooks was not a de facto member of the PHSCC), then Middlebrooks' application is better characterized as one to the NIH.

The Court of Appeals' instructions contains two or more different meanings. Additionally the instructions are reasonably susceptible to different constructions or interpretations. Moreover, the instructions are equivocal and ambiguous. The Court of Appeals issued a decision articulating that if the positions were designated for commissioned officers, then Ms. Middlebrooks would lack a Title VII remedy. This statement creates a problem because Ms. Middlebrooks was not a commissioned officer when she applied for the positions at issue. Moreover, the positions could be filled by civilian applicants in federal civilian service or commissioned officers in the Public Health Service Commissioned Corps. Accordingly, Ms. Middlebrooks has the right to request for the National Institutes of Health to consider her application for a distinct federal civilian position and for a distinct commissioned officer position as well.

Moreover, an individual may not meet the requirements to receive a commission in the Public Health Service Commissioned Corps. However, the individual may meet the requirements to receive a position as federal civilian personnel to an executive agency. Additionally, the Public Health Service Commissioned Corps do not have vacant positions exclusively opened to commissioned officers. The positions at issue were not exclusively open only to commissioned officers. The positions at issue were federal civilian positions which could be filled by either federal civilian personnel or commissioned officer personnel. Equally important, how should the district court characterize Ms. Middlebrooks' application, when the vacancies are open both to civilians and commissioned officers and Ms. Middlebrooks met the requirements for the federal civilian positions; however, Ms. Middlebrooks did not complete the application process to receive a commission from the United States Public Health Service Commissioned Corps?

More importantly, commissioned officer positions of the Public Health Service Commissioned Corps are derived from federal civilian positions of the Department of Health and Human Services and from the Federal Government. Since the National Institutes of Health is an operating division of the Department of Health and Human Services, the National Institutes of Health's vacancies can either be filled by federal civilians or commissioned officers of the Public Health Service Commissioned Corps. Therefore, Ms. Middlebrooks does not understand how any of the National Institutes of Health's nursing vacancies not be designated for commissioned officers.

Additionally, what if a person does not meet the criteria to become a commissioned officer, however the person meets the criteria to fill the position as federal civilian personnel? Does that person has the legal inherent right to pursue a Title VII remedy for non-selection for federal civilian vacancies, even though the federal vacancies were opened to commissioned officers? Additionally, should the Court of Appeals' instructions be interpreted to mean that an individual can not pursue a Title VII remedy for the National Institutes of Health's federal vacancies that are open to civilians and commissioned officers? If this is the interpretation, then what about the civilians who did not submit an application for a commission. Are those civilians precluded from pursuing a Title VII remedy, because the positions at issue were opened to commissioned officers? What about the civilians who did not complete the application process for the commission but completed the application process for the federal vacancy? Are those civilians precluded from pursuing a Title VII remedy, because the positions at issue were opened to commissioned officers?

The Court of Appeals also defines that a de facto member to the PHSCC as an individual whose application has been pre-approved for a commission in the Public Health Service Commissioned Corp. This definition presents a problem because the Public Health Service Commissioned Corps do not have a pre-commissioning program. Moreover, an individual must receive a job offer from an executive agency, before the individual application is approved for a commission in the Public Health Service Commissioned Corps.

Therefore, the Court of Appeals' instructions are not clearly and precisely expressed on how to determine the characterization of Ms. Middlebrooks' application to the National Institutes of Health. The instructions are not clear cut, definitive, specific, or exact. Additionally, the instructions opens up the opportunity for different interpretations which extends an enormous amount of discretion to the district court

It is imperative for the administration of judicial justice, that a court give explicit instructions, direct instructions, and detail instructions. Detail instructions will minimize misunderstanding and misinterpretation. Giving rise to the fact that the district court exhibited significant bias toward Ms. Middlebrooks, it is rather unjust to send Ms. Middlebrooks before the same judge with ambiguous instructions. The district court has a standing protocol to deprive Ms. Middlebrooks of her constitutional rights. Therefore, the district court will ultimately issue an unfavorably ruling against Ms. Middlebrooks based on the ambiguous instructions. This is turn will result in Ms. Middlebrooks having to file another appeal to the Court of Appeals on the same issues that Court of Appeals unwarrantedly, unlawfully, and unjustly rejected in Ms. Middlebrooks' initial pro se appeal.

The Court of Appeals strategically planned to issue ambiguous instructions with regard to Ms. Middlebrooks' case. As the record illustrates, Ms. Middlebrooks presented overwhelming evidence that the district court exhibited unwarranted bias against Ms. Middlebrooks. Ms. Middlebrooks also presented

evidence that the district court committed significant errors for the adjudication of Ms. Middlebrooks' Title VII civil action lawsuit. Ms. Middlebrooks requested for the Court of Appeals to adjudicate the constitutional deprivations presented in Ms. Middlebrooks' pro se brief. Ms. Middlebrooks also requested the Court of Appeals to adjudicate her pro se appeal on the grounds that Ms. Middlebrooks had a standing to amend her civil action complaint to come within the meaning of Title VII and had a standing right to pursue a Title VII claim against the National Institutes of Health for the non selection of three federal civilian positions.

However, the Court of Appeals elected not to adjudicate the issue presented in Ms. Middlebrooks' pro se brief. Rather than adjudicating Ms. Middlebrooks' issues, the Court of Appeals issued an order directing the district court to determine the characterization of Ms. Middlebrooks' application to the National Institutes of Health. The Court of Appeals issued an ambiguous criteria for determining the characterization of Ms. Middlebrooks' application to the National Institutes of Health. Equally disturbing, the ambiguous criteria must be implemented without affording Ms. Middlebrooks the constitutional legal inherent right to amend her civil action complaint. Ms. Middlebrooks has the right to amend her complaint for the non-selection for three federal civilian positions, regardless of the application submitted the Public Health Service Commissioned Corps. However, the Court of Appeals is attempting to link the commissioned corps application in efforts to deprive Ms. Middlebrooks her right to pursue a Title VII claim against the National Institutes of Health

for non-selection of three federal civilian nursing positions. Moreover, the Commissioned Corps' application process has no linked to the discriminatory employment practices that occurred with regard to the application submitted for the federal vacancies.

As illustrated by the opinion, the Court of Appeals vacated and remanded the case back to the district court. However, the Court of Appeals' remand was based on an assertion that the Court of Appeals could not determine the characterization of Ms. Middlebrooks' application to the National Institutes of Health. Overwhelming evidence exist in the appellate court record to substantiate that the National Institutes of Health's interpreted Ms. Middlebrooks' application as an application for federal civilian vacancies. However, the Court of Appeals did not remand the case based on the fact that Ms. Middlebrooks has the constitutional right to amend her complaint to come within the meaning of Title VII of the Civil Rights Act of 1964. Additionally, the Court of Appeals did not remand the case based on the fact that the district court did not have the constitutional powers to dismiss Ms. Middlebrooks' civil action complaint with prejudice.

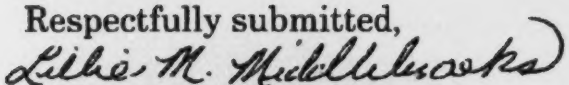
Therefore, the Court of Appeals' order does not open up legal access for Ms. Middlebrooks to pursue an unequivocal Title VII claim against the National Institutes of Health. The order contains ambiguous instructions for determining whether Ms. Middlebrooks has the right to pursue a Title VII claim against the National Institutes of Health. Ms. Middlebrooks is entitled to have detail instructions, straightforward instructions, and explicit

instructions with regard to Ms. Middlebrooks' unequivocal right to pursue a Title VII claim against the National Institutes of Health. The Court of Appeals has failed to give explicit instructions and frank instructions with regard to Ms. Middlebrooks' constitutional right to pursue a Title VII claim. Therefore, certiorari should be granted to determine whether Ms. Middlebrooks has the constitutional legal inherent right to pursue a Title VII claim for the non-selection of three federal civilian nursing positions. Certiorari should also be granted to determine whether Ms. Middlebrooks has the legal inherent right to amend her civil action complaint to come within the meaning of Title VII. Lastly, certiorari should be granted to determine whether there are any provisions within constitutional law, which explicitly precludes a pro se litigant from amending a pro se civil action complaint.

CONCLUSION

It is conclusive that this case requires intervention from the U.S. Supreme Court to resolve the distinct constitutional deprivations implemented by the district court and the appellate court. The Court of Appeals' legal opinion does not provide an opportunity for Ms. Middlebrooks to seek redress with regard to her discrimination claim against the National Institutes of Health. The First Amendment to the U.S. Constitution specifically prohibits congress from abridging "the right of the people to petition the Government for redress of grievances." Accordingly, based on the foregoing reasons in this petition, the Petitioner respectfully request for this Court to grant a writ of certiorari.

Respectfully submitted,



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APPENDIX

No._____

In The
Supreme Court of the United States

LILLIE M. MIDDLEBROOKS,
Petitioner,

v.

MICHAEL O. LEAVITT
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1860
D.C. No. CA-04-2792-PJM

LILLIE M. MIDDLEBROOKS,
Plaintiff-Appellant,

v.

MICHAEL O. LEAVITT, SECRETARY OF
HEALTH AND HUMAN SERVICES
Defendant-Appellee

PUBLISHED OPINION

Appeal from the United States District Court for the District of Maryland Peter J. Messitte, District Judge.
(CA-04-2792-PJM)

Argued: December 4, 2007

Decided: May 6, 2008

Before MOTZ and DUNCAN, Circuit Judges, and Leonie M. BRINKEMA, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part and vacated and remanded in part by published opinion. Judge Motz wrote the opinion, in which Judge Duncan and Judge Brinkema joined.

COUNSEL

ARGUED: David Joseph Arkush, PUBLIC JUSTICE, and Washington, D.C., for Amicus Supporting Appellant. Melanie L. Glickson, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF:** Steven H. Goldblatt, Director, Ari Hershowitz, Student Counsel, Gregory J. Langlois, Student Counsel, GEORGETOWN UNIVERSITY LAW CENTER, Appellate Litigation Program, Washington, D.C., for Amicus Supporting Appellant. Rod J. Rosenstein, United States Attorney, Neil R. White, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

In her *pro se* complaint, Lillie M. Middlebrooks alleges that the Secretary of the United States Department of Health and Human Services ("HHS") violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 (2000) and 42 U.S.C. § 1981 (2000), in refusing to hire her. On the Government's motion, the district court dismissed Middlebrooks' complaint, holding that it lacked subject matter jurisdiction over her Title VII claim and that her § 1981 claim also failed. We affirm in part, but because the record

provides insufficient support for critical elements of the district court's order, we also vacate and remand in part.

I.

In February and March 2003, Middlebrooks, an experienced, African-American registered nurse, applied for three nursing positions at the Warren Grant Magnuson Clinical Center, a program operated by the National Institutes of Health ("NIH"), an agency within HHS. Middlebrooks sought to fill an NIH nursing position as a commissioned officer of the United States Public Health Service Commissioned Corps ("PHSCC").

The PHSCC is one of the seven uniformed services of the United States military designated under 10 U.S.C. §101(a)(4)-(5) (2000); other uniformed services include the five armed forces (Army, Navy, Air Force, Marine Corps, and Coast Guard) and the commissioned corps of the National Oceanic and Atmospheric Administration. *Id.* The PHSCC employs approximately 6,000 officers in a variety of medical health professions; those officers administer programs designed to promote public health, prevent disease, and advance public health science. *See* U.S. Dep't of Health & Human Servs., U.S. Pub. Health Serv. Commissioned Corps, About the Commissioned Corps, http://www.usphs.gov/aboutus/ (last visited Apr. 16, 2008). PHSCC commissioned officers may serve in programs administered directly by the PHSCC, or they may serve in a variety of programs within HHS, such as the NIH, the Centers for Disease Control and Prevention, and the Food and Drug Administration. *See* U.S. Dep't of Health &

Human Servs., U.S. Pub. Health Serv. Commissioned Corps, Agencies, http://www.usphs.gov/aboutus/agencies.aspx (last visited Apr. 16, 2008). Alternatively, they may seek employment in certain non-HHS federal agencies and programs, such as the Environmental Protection Agency and the National Park Service. *See id.* In order to serve in any programs other than those administered directly by the PHSCC, an individual must apply to, and be accepted by, *both* the PHSCC and the executive agency in which he or she wishes to work. Only if the PHSCC *and* the executive agency determine to hire an applicant can that applicant become a commissioned officer working within the specified executive agency. *See* U.S. Dep't of Health & Human Servs., U.S. Pub. Health Serv. Commissioned Corps, Overview of the Application Process, http://www.usphs.gov/ apply now/#overview (last visited Apr. 16, 2008). Yet, when an applicant seeks to serve as a commissioned officer in an executive agency position that is not dedicated exclusively to the PHSCC, hiring officials within the executive agency assess the applicant's qualifications in a manner identical to the way in which they assess civilian candidates for that position. In fact, the applicant may be hired to serve in the executive agency position even if the applicant is not offered, or decides to decline, a position with the PHSCC.

In this case, after the executive agency in question, NIH, determined not to hire Middlebrooks, she filed a formal employment discrimination complaint with the NIH Office of Equal Opportunity and Diversity Management. Middlebrooks complained that NIH officials discriminated against her because of her

race when they failed to hire her for the first two positions to which she applied, and, after she complained of this discrimination, the officials retaliated against her by excluding her from consideration for a third position. HHS officials investigated the complaint and then issued a final decision concluding that no evidence supported Middlebrooks' race discrimination or retaliation claims.

Having exhausted her administrative remedies, Middlebrooks brought this action against the Secretary of HHS. She asserts a claim under Title VII, alleging discrimination on the basis of race and retaliation, as well as a claim under 42 U.S.C. § 1981, alleging intentional discrimination on the basis of race. Middlebrooks seeks monetary and injunctive relief for those asserted violations.

The Government moved to dismiss Middlebrooks' complaint, contending that the district court lacked subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The court granted the motion, reasoning that the "military exception" to Title VII exempted from Title VII protection both PHSCC commissioned officers and those *applying* to be PHSCC officers. The court then rejected Middlebrooks' claim under § 1981, because it concluded that "Title VII represents the exclusive remedy for federal sector employees who wish to pursue claims of intentional discrimination in employment."

Middlebrooks noted a *pro se* appeal. At our invitation, the Appellate Litigation Program of the Georgetown University Law Center filed amicus briefs on her behalf, which we very much appreciate.

We review *de novo* a dismissal for lack of subject matter jurisdiction. *Suter v. United States*, 441 F.3d 306, 310 (4th Cir. 2006). We first address Middlebrooks' Title VII claim and then consider her § 1981 claim.

II.

Title VII outlaws discrimination in employment based on race and waives sovereign immunity with respect to claims for "personnel actions affecting employees or applicants for employment . . . in military departments . . . [and] in executive agencies . . . ." 42 U.S.C. § 2000e-16(a) (2000). Although the Supreme Court has not considered the question, numerous appellate courts, including this one, have concluded that uniformed members of the armed services do *not* constitute "employees . . . in military departments," *id.*, and so do not fall within the scope of the waiver of sovereign immunity contained in § 2000e-16.[1] *See, e.g., Randall v. United States*, 95

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[1]For the sake of convenience, courts have often described the exclusion of uniformed personnel in the armed forces from the scope of § 2000e-16(a) as the "military exception" to Title VII. *See, e.g., Hedin v. Thompson*, 355 F.3d 746, 747-48 (4th Cir. 2004); *Doe v. Garrett*, 903 F.2d 1455, 1461 (11th Cir. 1990). That phrase may be misleading, because it may imply that § 2000e-16(a) initially waived sovereign immunity for all "military" employees, but *courts* created an *exception* to that *waiver* in order to eliminate otherwise valid Title VII claims for uniformed military personnel. As *Randall* makes clear, however, the *original scope* of the § 2000e-16(a) waiver in fact "includes only civilian employees of the Army, Navy, or Air Force." 95 F.3d at 343. This construction of § 2000e-16(a), which recognizes that Congress never waived sovereign immunity with regard to uniformed military personnel, does

F.3d 339, 343 (4th Cir. 1996) (holding that "Congress intended [in § 2000e-16] to include only civilian employees of the military departments, and not uniformed service members, within the reach of Title VII"). Courts have also concluded that Congress did not intend § 2000e-16(a)'s waiver of immunity to encompass applicants for enlistment in the uniformed armed services and therefore have held that applicants may not bring Title VII claims. *See, e.g.*, *Johnson v. Alexander*, 572 F.2d 1219, 1223-24 (8th Cir. 1978).

For several years, the federal appellate courts differed as to whether the § 2000e-16(a) waiver encompassed the PHSCC, or whether, like the armed forces, the PHSCC fell outside of the waiver's intended scope. *Compare Salazar v. Heckler*, 787 F.2d 527, 533 (10th Cir. 1986) (concluding that § 2000e-16(a) "did not extend the protections of Title VII . . . to commissioned officers, or to applicants for commissioned officer positions, in the Public Health Service"), *with Milbert v. Koop*, 830 F.2d 354, 359 (D.C. Cir. 1987) (holding that "the 'military exception' to Title VII . . . does not apply to a commissioned officer of the PHS").

Congress responded to this debate by enacting the Health Professions Education Partnerships Act of 1998, which added subsection (f) to 42 U.S.C. § 213 (2000). Pub. L. No. 105-392, § 402(a), 112 Stat. 3524, 3587-88 (codified at 42 U.S.C. § 213(f)). That provision states, in pertinent part, that "[a]ctive service of commissioned officers of the [PHSCC]

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not, strictly speaking, constitute an "exception" to the statutory waiver.

shall be deemed to be active military service in the Armed Forces of the United States for purposes of all laws related to discrimination on the basis of race, color, sex, ethnicity, age, religion, and disability." *Id.* (emphasis added). In 2004, interpreting this legislation, we concluded that Congress intended to bar claims under the antidiscrimination laws for *all* PHSCC officers in active service, not merely those engaged in active *military* service. *Hedin v. Thompson*, 355 F.3d 746, 748, 750-51 (4th Cir. 2004).

Together, § 213(f), *Randall*, and *Hedin* make clear that Title VII claims by "commissioned officers of the [PHSCC]" are not cognizable, because those individuals are "deemed" uniformed officers of the military for purposes of anti-discrimination laws, and in § 2000e-16(a) Congress did not waive sovereign immunity for uniformed officers of the military. In the case at hand, the Government maintains, and the district court held, that Congress has similarly not waived sovereign immunity with respect to Title VII claims by PHSCC *applicants*, and, for this reason, Middlebrooks has no cognizable Title VII claim. We are the first appellate court to consider this question.

A.

The Government initially contends that the "plain language of the statutes at issue" supports its view that Title VII remedies are not available to PHSCC applicants. The Government argues that because § 2000e-16(a) addresses *both* employees *and* "applicants" to military departments, § 213(f) must be read to apply to both PHSCC employees and applicants, as well. If the Government's reading of §

213(f) is correct, then, like PHSCC officers, applicants to the PHSCC would be beyond the scope of § 2000e-16(a). *See Randall*, 95 F.3d at 343; *Johnson*, 572 F.2d at 1223-24.

The statutory language simply does not support the Government's argument. While § 2000e-16(a) addresses both "employees" and "applicants for employment" in "military departments" and makes no distinction between these two groups of individuals, § 213(f) does not mention PHSCC "applicants." Rather, as we noted in *Hedin*, 355 F.3d at 748-51, § 213(f) clearly governs only PHSCC "commissioned officers" in "[a]ctive service." No plain language transforms mere applicants to the PHSCC into "commissioned officers" of the PHSCC. And given that PHSCC applicants have not (yet) received commissions, they certainly have not engaged in "[a]ctive service" in the PHSCC.

Thus, we conclude that, contrary to the Government's assertion, the plain language of the statutes at issue here does not mandate the conclusion that PHSCC applicants are barred from bringing Title VII claims. We take Congress at its word and assume, "as we must, that 'Congress says in a statute what it means and means in a statute what it says.'" *Ayes v. U.S. Dep't of Veterans Affairs*, 473 F.3d 104, 111 (4th Cir. 2006). Accordingly, we "refuse to venture beyond the confines of the statutory language," *id.*, to hold that this language bars PHSCC applicants from asserting Title VII claims. Rather, we conclude that the statute's silence on this issue means that § 213(f) does not encompass PHSCC applicants.

B.

Because § 213(f) does not bar Title VII claims by PHSCC applicants, we must return to the question that divided the circuits prior to the passage of § 213(f) — whether the PHSCC is included within the scope of the § 2000e-16(a) waiver of sovereign immunity. That is, we must determine if Congress intended applicants to the PHSCC to be treated as applicants to "military departments . . . [or] executive agencies," for whom it has waived sovereign immunity. § 2000e-16(a).

In *Randall*, we noted that "the term 'military departments' includes only *civilian* employees of the Army, Navy, or Air Force," and excludes uniformed military personnel. 95 F.3d at 343 (emphasis added). The PHSCC does not fall neatly within this dichotomy, however, as its members possess characteristics of both "civilian employees" and "uniformed military personnel." *Compare Salazar*, 787 F.2d at 530 (noting that PHSCC officers receive pay and allowances according to the same statutory scheme as members of the armed forces, that they may purchase supplies from the armed forces at the same prices, and that the grades, ranks, and titles of commissioned PHSCC officers are organized in a manner corresponding to those in the Army), *with Milbert*, 830 F.2d at 358-59 (observing that, under 42 U.S.C. § 202 (2000), the PHSCC is an agency in HHS rather than a military department, that PHSCC officers are free to unilaterally terminate their status in the PHSCC, and that PHSCC officers are not subject to the Code of Military Justice unless the President so declares, pursuant to 42 U.S.C. § 217 (2000)).

Thus, the very nature of the PHSCC renders it difficult to determine whether it is an executive agency covered by the § 2000e-16(a) waiver, whose applicants can bring Title VII claims, or a uniformed military service not covered by the § 2000e-16(a) waiver, whose applicants cannot bring Title VII claims. Moreover, although statutory definitions of the "armed forces" do not include the PHSCC, *see, e.g.*, 10 U.S.C. § 101(a)(4); 5 U.S.C. § 2101(2) (2000), the PHSCC *is* consistently included within the slightly broader designation of "uniformed services," *see, e.g.*, 10 U.S.C. § 101(a)(5), 5 U.S.C. § 2101(3).

Despite these factors that make it difficult to classify the PHSCC, several reasons persuade us that Congress did *not* intend the § 2000e- 16(a) waiver of sovereign immunity to cover the PHSCC, and so applicants to the PHSCC cannot bring Title VII claims. First, although the PHSCC shares characteristics of both civilian and military personnel, the legislative history of § 2000e-16(a) suggests that, in passing the amendment to Title VII that added this provision, Congress intended § 2000e-16 to reach only federal employees in the "civil service" and "competitive service" who were, at that time, under the authority of the Civil Service Commission. *See Salazar*, 787 F.2d at 531-33 (explaining that Congress sought to redress "a general dissatisfaction with the Civil Service Commission's performance in implementing the national policy of equal employment opportunity"); *see also Gonzalez v. Dep't of Army*, 718 F.2d 926, 928 (9th Cir. 1983). The PHSCC is, however, explicitly excluded from the operation of the civil service laws, *see* 42 U.S.C. § 204 (2000), and from

the competitive service, *see* 5 U.S.C. §§ 2101, 2102 (2000). *See Salazar*, 787 F.2d at 530-31. Thus, we agree with the Tenth Circuit that Congress did not intend § 2000e-16(a) to extend Title VII protections "to commissioned officers, or *to applicants* for commissioned officer positions, in the [PHSCC]." *Id.* at 533 (emphasis added).

Second, rules of statutory construction dictate that waivers of sovereign immunity "must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (internal quotations, alterations, and citations omitted); *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity . . . . The terms of consent to be sued may not be inferred, but must be unequivocally expressed." (internal quotations and citations omitted)). The debate as to whether § 2000e-16(a) includes the PHSCC indicates the absence of any "clear statement . . . waiving sovereign immunity" for claims by PHSCC officers and applicants. *See White Mountain Apache Tribe*, 537 U.S. at 472.

Finally, unlike the courts that initially considered the question of whether § 2000e-16(a) extended to the PHSCC, *e.g.*, *Salazar*, 787 F.2d at 533; *Milbert*, 830 F.2d at 359, we are aided by the passage of 42 U.S.C. § 213(f); thus, we endeavor to construe § 2000e-16(a) in light of Congress's intentions in enacting § 213(f). *See Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 837 (2008) (reasoning that, although an amendment to the statute at issue did not govern

the petitioner's claim, "the amendment is relevant because our construction [of the statutory text] . . . must, to the extent possible, ensure that the statutory scheme is coherent and consistent"). Although the plain language of § 213(f) speaks only to "active service of commissioned officers," we believe that it does evince Congress's general intent to align the PHSCC with the armed forces rather than with civilian employment for purposes of employment discrimination remedies.

For these reasons, we conclude that the waiver of sovereign immunity granted by § 2000e-16(a) does not encompass the PHSCC. Therefore, neither commissioned officers nor applicants to the PHSCC may bring claims under Title VII.

C.

This legal conclusion does not, however, resolve the question of whether Middlebrooks may bring a cognizable Title VII claim. This is so because of the nature of the unique hiring process for PHSCC commissioned officers, which requires formal approval by *both* the PHSCC *and* an executive agency. The vagaries in this hiring process create a factual question as to whether to characterize the application from which Middlebrooks' claims arise as one to the PHSCC — in which case she may not pursue a Title VII claim for the personnel actions at issue — or one to the NIH — in which case she may pursue such a remedy against NIH hiring officials, because Congress has waived sovereign immunity for claims arising from "personnel actions affecting . . . applicants for employment . . . in *executive agencies*." § 2000e-16(a) (emphasis added).

For example, the Government has submitted that some executive agency assignments are designated as PHSCC positions under the statutory appointing authority provided by Title 5 of the United States Code. According to the Government, when a PHSCC candidate applies to a Title 5 position, that individual is exempt from the competitive process required of civilian applicants and automatically added to the list of eligible candidates for consideration. If not approved by the PHSCC for commissioning, the individual's parallel application to the Title 5 executive agency position apparently is automatically rejected. When applicants seek to fill positions like this, their executive agency applications are better characterized as merely one element of the larger PHSCC hiring process, for which no Title VII remedies are available.

But the Government has additionally submitted that some executive agency assignments for PHSCC candidates are available under the very different statutory authority of Title 42. According to the Government, applicants to Title 42 positions are *not* exempted from the competitive process required of civilian applicants; rather, executive agency officials assess their applications in the same manner that they assess all other applications. In such cases, the executive agency and the PHSCC applications *may* be sufficiently distinct and independent to make Title VII remedies available for discriminatory personnel actions occurring solely within the executive agency application process. But, even with respect to these applications, the timing of the PHSCC approval process and the amount of discretion that process affords PHSCC hiring

authorities may foreclose such remedies. If for instance (as the Government alleges here), the PHSCC has "preapproved" an applicant at the time the executive agency considers the application, then the applicant would essentially be a *de facto* member of the PHSCC for purposes of her executive agency application and thus would not be permitted to pursue Title VII remedies under § 2000e-16(a). If, however, the PHSCC does not begin consideration of an applicant until an executive agency has accepted the applicant, or the PHSCC retains discretion to reject an applicant regardless of approval by an executive agency, then the applicant would *not* be a *de facto* member of the PHSCC for purposes of the executive agency application. Rather, as a civilian applicant, she would be entitled to pursue Title VII remedies against the executive agency hiring officials.

Although it is clear in this case that the personnel action Middlebrooks challenges occurred within the civilian agency, we cannot determine from the record whether her application to the NIH is better characterized as merely one element of the larger PHSCC hiring process or whether her application to the NIH was truly independent from the PHSCC hiring process.[2] If the nursing positions to which

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[2]At our request, the Government filed a letter with us responding to certain questions about the facts raised at oral argument. That letter seems to indicate that the positions for which Middlebrooks applied were not designated PHSCC positions but rather could be filled by civilians. The district court, however, has had no opportunity to consider this information or other facts relevant to construing Middlebrooks' application; thus, remand is appropriate.

Middlebrooks applied were designated for commissioned PHSCC officers, then Middlebrooks' application is best characterized as one to the PHSCC. Accordingly, she would lack a Title VII claim under § 2000e-16(a) with regard to any hiring decision related to those positions. But if the NIH vacancies were not designated for commissioned officers and could be filled by civilians, *and* if the PHSCC retained discretion to reject applicants regardless of their approval by the NIH (that is, if Middlebrooks was not yet a *de facto* member of the PHSCC), then Middlebrooks' application is better characterized as one to NIH. Under those facts, the decision by NIH officials to reject Middlebrooks' application would be sufficiently distinct from the PHSCC application process that she could be characterized as a civilian applicant to an executive agency for purposes of § 2000e-16(a), and thus she could assert a Title VII claim against the NIH hiring officials.

We therefore vacate the judgment of the district court on Middlebrooks' Title VII claim and remand for the court to determine how best to characterize Middlebrooks' application. Should the court determine that it is properly viewed as one to the PHSCC, then Middlebrooks may not assert a claim under § 2000e-16(a). But if the court determines that the application is better viewed as one to NIH, then it should deny the Government's motion to dismiss and permit Middlebrooks to proceed on her Title VII claim against NIH hiring officials under § 2000e-16(a).

III.

In addition to her Title VII claim, Middlebrooks also asserts a discrimination claim under 42 U.S.C. § 1981. That statute does not, however, provide a remedy against federal officials. *See* § 1981. Amicus, arguing on behalf of Middlebrooks, urges us to construe Middlebrooks' § 1981 claim as a Fifth Amendment claim properly lodged against NIH officials in their individual capacities or, alternatively, to instruct the district court to allow Middlebrooks to amend her complaint to assert a Fifth Amendment claim against those officials. Because neither course would afford Middlebrooks an opportunity for relief, we adopt neither; instead, we affirm the judgment of the district court dismissing this claim. [3]

If the district court should conclude that Middlebrooks has a cognizable claim against NIH officials under Title VII, then Title VII represents Middlebrooks' exclusive remedy for any claim against the United States for intentional discrimination in employment. *See Davis v. Passman*, 442 U.S. 228, 247 n.26 (1979); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976). Thus, if the district court construes Middlebrooks' application as one to the NIH, and she is therefore permitted to bring a Title VII claim against NIH hiring officials under § 2000e-16(a), then she may

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[3]Because we reject on other grounds the contention that Middlebrooks might succeed on a claim under the Fifth Amendment, we need not address the Government's assertion that the PHSCC administrative review mechanisms afford meaningful redress for Middlebrooks' claims and therefore foreclose the need for a new, judicially-crafted cause of action.

not also proceed on a Fifth Amendment claim against those officials based on the same, allegedly discriminatory conduct.

Even if the district court concludes that Middlebrooks' application is better characterized as one to the PHSCC, and therefore § 2000e- 16(a) does not waive sovereign immunity for her claims, Middlebrooks would still lack a cognizable claim under the Fifth Amendment. In *Davis*, the Supreme Court implied a Fifth Amendment cause of action for damages when a federal employee claimed gender-based discrimination in employment. 442 U.S. at 242-44. The Court did so in reliance on its earlier opinion in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), in which it held that a citizen who suffers injury to a constitutionally protected interest at the hands of federal officials may have a cognizable claim against those officials in their individual capacities.

The Supreme Court has instructed that a *Bivens* remedy is not available, however, when "special factors counsel [ ] hesitation." *Id.* at 396. The Court has also held that the need to avoid "congressionally uninvited intrusion into military affairs by the judiciary" constitutes one of those "special factors." *United States v. Stanley*, 483 U.S. 669, 683 (1987). [4]

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[4]The Court first recognized the compelling rationale for protecting the Government from suits by uniformed members of the military for injuries that "arise out of or are in the course of activity incident to service" in *Feres v. United States*, 340 U.S. 135, 146 (1950). As the Court later suggested, the "peculiar and special relationship of the soldier to his superiors," and "the effects of the maintenance of such suits on discipline," animate the *Feres* doctrine. *United States v. Brown*, 348 U.S. 110, 112 (1954).

In this case, should the district court determine that Middlebrooks' application is best characterized as one to the PHSCC, then, because we believe that the statutory scheme evinces congressional intent to align the PHSCC with the armed forces, and members of the armed forces would lack a *Bivens* remedy for discrimination claims arising out of military employment, Middlebrooks also would have no *Bivens* remedy against NIH officials. *See Chappell v. Wallace*, 462 U.S. 296, 298-304 (1983) (holding that recognizing a *Bivens* claim against Navy officers would undermine military decisions); *see also Stanley*, 483 U.S. at 679-84 (holding that "special factors" counseling against a *Bivens* remedy may exist even when the claim asserted is against civilian personnel, so long as military affairs are implicated). And if Middlebrooks has no cognizable *Bivens* claim against NIH officials, then *Davis* affords no right of action under the Fifth Amendment.[5] *See* 442 U.S. at 243-44.

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[5]Amicus argues that even if Middlebrooks may not proceed on her Title VII or her Fifth Amendment claims, the district court still has jurisdiction over her claim for equitable relief. Because Middlebrooks' initial complaint names only the Secretary of HHS as a defendant, Amicus asks us to direct the district court to permit Middlebrooks to amend her complaint to assert a claim for injunctive relief against the relevant NIH hiring officials in their individual capacities. Our sister circuits have divided on the question of whether an individual can seek equitable relief for alleged constitutional violations arising in the context of military personnel decisions. *Compare Dibble v. Fenimore*, 339 F.3d 120, 126-28 (2d Cir. 2003), *with Wigginton v. Centracchio*, 205 F.3d 504, 513 (1st Cir. 2000). Since the district court did not address the question and the parties have not thoroughly briefed it, we do not address the issue now. Of course, the district court may do so on remand if Middlebrooks presents the issue.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CASE NO. PJM 04-2792

LILLIE M. MIDDLEBROOKS,
Plaintiff,

v.

TOMMY G. THOMPSON,
SECRETARY, United States Department Health and Human Services
Defendant[1]

[FILED: June 13, 2005, at Greenbelt by Clerk U.S. District Court District Maryland]

OPINION

Lillie M. Middlebrooks has filed a pro *se* Complaint against the Secretary of the United States Department of Health and Human Services ("HHS"), alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, *et seq.*[2] Middlebrooks claims she was discriminated against owing to her race when seeking employment as a Commissioned

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[1]Thompson is no longer Secretary of HHS, having been replaced by Michael O. Leavitt.

[2]The Complaint proceeds in three Counts: (1) disparate treatment in violation of Title VII, (2) intentional discrimination in violation of 42 U.S.C. § 1981, and (3) retaliation in violation of Title VII.

Officer in the United States Public Health Service's Commissioned Corps (CCPHS). Defendant has filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1).

The critical issue for decision is whether the protections of Title VII are available to civilian applicants seeking to become Commissioned Officers of CCPHS or whether the so called "military exception" to Title VII, codified in 42 U.S.C. § 213(f), excepts civilian applicants.

No hearing is necessary to dispose of this matter. Local R. 105.6(D.Md 1999). Having considered the pleadings, the Court GRANTS the Motion to Dismiss.

I.

The CCPHS is one of the Uniformed Services of the United States(which also include the Army, Navy, and Air Force, among others and is responsible for providing certain health care services on behalf of the Federal Government. Commissioned Officers of the Corps include health care professionals such as doctors and nurses.

The CCPHS does not commissioned applicants into the inactive reserve ant call them to duty at a later date as the military does. Accordingly an applicant must be selected for a job in order to be commissioned. This means that the applicant must apply both to the Commissioned Corps and to the agency where she wishes to work. The Corps processes the application for admission to its membership, while the hiring agency reviews the

actual applicant for the job being advertised. In a word, the application process is a dual one.

Both the hiring agency and the Commissioned Corps must approve the application, after which the applicant receives an offer from the Corps and is called to activity.

Lillie M. Middlebrooks, an African-American female, applied for three nursing vacancies to be a Commissioned Officer at the National Institutes of Health, Warren Gant Magnuson Clinical Center, with the U.S. Department of Health and Human Services. Middlebrooks was chosen for none of the positions, which she says on account of her race or in retaliation for engaging protected activities under the law. As a result, she filed a complaint with HHS alleging illegal discrimination and employment.

In its Final Agency Decision, HHS found no evidence to support the race discrimination and retaliation claims. This lawsuit followed.

II.

A motion filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges the federal court's subject-matter jurisdiction to adjudicate a case. Fed. R. Civ. 12(b)(1). Subject matter jurisdiction pertains to the court's authority over the category of the claim in sue. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.C. 574, 577 (1999). The Fourth Circuit has held that a motion properly lies to determine the scope of military exception as it applies to Title VII and the CCPHS. Hedin v.

Thompson, 355 F.3d 746 (4th Cir. 2004).

III.

Title VII, which otherwise outlaws discrimination in employment based on race and other factors, provides no remedy for uniformed service members. *Id Roper v. Department of the Army,* 832 F.2d 247-48(2nd Cir. 1987); Taylor *v. Jones,* 653 F.2d 1193, 1200 (8th Cir. 1981). As the Supreme Court noted in *Chapell v. Wallace*, 462 U.S. 296 1983:

The special status of the military has required the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel... The special nature of military life-- the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel-- would be undermine by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. 426. U.S. at 303-04.

This principle applies even where allegations of racial discrimination are involved.

It is indisputable that CCPHS Officers, even if not engaged in military service, are treated as military officers for purpose of the military exception. Hedin, 355 F.3d at 750-51.

The question is the present case is whether an applicant for a Commissioned Officer position in the CCPHS is covered by the exception, especially where

she is obliged to make a parallel civilian-type application in conjunction with the application for admission to the Corps.

IV.

Because recent legislation, i.e. 42 U.S.C. 213(f), refers to "Active Service Commissioned" as being barred from asserting employment discrimination claims,[3] Middlebrooks suggest that applicants who are not already serving active service commissioned officers are not barred.

On the other hand, Defendant cites to *Spain v. Ball,* 928 F.2d 61 (2nd Cir. 1991), an opinion authored by Judge Leval, in which the Second Circuit held that an applicant for an officer position with the Navy, a uniformed position, was not entitled to assert a Title VII against the Medical Service Corps. Although the Second Circuit in Spain simply declares without discussion that one applying for an officer position with the Navy is subject to the military exception, Hupp v. United States Department of the Army, 144 F.3d 1144 (8th Cir. 1998) provides a more explicit rationale. There a female applied for a technician position in the National Guard in what was a two-stage hiring process, one which primarily considered her military qualifications and the other her civilian qualification. When she was not hired, she asserted a claim based on gender discrimination, contending

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[3] The statute provides: (f) Active service deemed active military service with respect to antidiscrimination laws Active service of commissioned officers of the [Public Health] Service shall be deemed to be active military service in the Armed Forces of the United States for purposes of all laws related to discrimination on the basis of race, color, sex, ethnicity, age, religion, and disability. 42 U.S.C. § 213(f).

in effect that the civilian and military aspects of the technician position were separable. The court, however, found that the hiring process could not be separated into various stages for purposes of review and that the hiring for a National Guard technician position necessarily implicated both the candidate's civilian and military qualifications. In consequence, the military exception was held to apply and the claim was held non-judiciable.

This Court finds the logic of *Hupp* applicable in the present case. Here it clear that simultaneously with the agency's evaluation of the application, the CCPHS makes parallel determinations as to whether the applicant is qualified to be an officer and at what rank and pay. In short, while there may be civilian aspects to the dual application procedure in CCPHS hirings, this is an example of a personnel action that is "integrally related to the military's unique structure." *See Mier v. Owens,* 57 F.3d 747, 750 (9th Cir. 1995) cert. denied 517 U.S. 1103 (1996) (holding plaintiff's claim non-justifiable because it related to military promotion).

Accordingly, the Court holds that Middlebrooks is barred by the military exception to Title VII from proceeding with her Title VII claim in this case.

V.

Middlebrooks' remaining arguments avail her little. The fact that as part of its Final Agency Decision, HHS indicated that she had a right to file a civil action in an appropriate U.S. District Court is of no legal effect. Subject-matter jurisdiction of a federal court cannot be conferred by the parties, nor can a

defect in subject-matter jurisdiction be waived by the parties. *See United States v. Cotton,* U.S. 625, 630 (2002). Subject matter, moreover, cannot be conferred by waiver or estoppel. *Wisconsin Department of Corrections v. Schacht,* 524 U.S. 381, 389 (1998). Federal courts "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). Accordingly, whatever HHS may have stated in its Final Agency Decision, this Court is not authorized to exercise jurisdiction in this case.

Finally, it is clear that Title VII represents the exclusive remedy for federal sector employees who wish to pursue claims of intentional discrimination in employment. A party may not maintain as an alternative a suit pursuant to 42 U.S.C. § 1981. Brown v. General Services Admin., 425 U.S. 820, 835 (1976).

For the reasons, Count II of the Complaint also fails.

VI.

The Court GRANTS Defendant's Motion to Dismiss with prejudice.

A separate Order will be entered.

June 10, 2005

"s/"

PETER J. MESSITTE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CASE NO. PJM 04-2792

LILLIE M. MIDDLEBROOKS,
Plaintiff,

v.

TOMMY G. THOMPSON,
SECRETARY, United States Department Health
and Human Services
Defendant

[FILED: June 13, 2005, at Greenbelt by Clerk U.S. District Court for the District Maryland]

FINAL ORDER OF JUDGMENT

Upon consideration of Defendant's Motion to Dismiss [Paper No. 10] and Plaintiff's Opposition to same [Paper No. 12], it is for the reasons set forth in the accompanying Opinion, this 10th day of June, 2005

Ordered:

1) Defendant's Motion to Dismiss [Paper No. 10] is **GRANTED** and the Complaint is **DISMISSED**; AND

2) The Clerk is directed to **CLOSE** this case.

"s/"

PETER J. MESSITTE
UNITED STATES
DISTRICT JUDGE